Supreme Court, U.S.
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No. 10-645 NOV 9 - 2010

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In The

Supreme Court of the United States

MAUREEN K. RAYNOR and
JOHN PATRICK RAYNOR,

Petitioners,

v.

RICHARD D. MYERS,
Chapter 7 Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Viewed narrowly, whether the Eighth Circuit Court of Appeals erred and acted contrary to precedent of this Court, *Graham County Soil & Water Conservation Dist. v. U.S. ex rel., Wilson*, 545 U.S. 409, 125 S. Ct. 2444, 2550-51 (2005), by relying upon *Federal Rule of Civil Procedure 6(a)* to commence a limitation period the *day after* there was a complete and present cause of action.

Viewed globally, whether the Eighth Circuit Court of Appeals erred, through this decision, by (1) joining in on widening the schism between this Court and the other Circuit Courts on the issue of law for determining limitation periods, (2) defeating the Constitutional right of equal protection under the law, and (3) failing to recognize the judicial hierarchy of law by disregarding this Court's precedent. This Court has "repeatedly recognized that Congress legislates against the standard rule"; nevertheless, the Circuit Courts have repeatedly applied the Modern Rule. The Modern Rule deploys *Federal Rule of Civil Procedure 6(a)* to find that a limitation period commences the day after there is a complete and present cause of action, and extends a limitation period to the next business day when it would have otherwise expired on a weekend or holiday.

PARTIES TO THE PROCEEDING

Petitioners are Maureen K. Raynor ("M. Raynor"), non-debtor wife, and John P. Raynor ("J. Raynor"), debtor and husband. Maureen Raynor was a defendant in an adversary proceeding instigated by Richard D. Myers, Trustee ("Trustee") in the Chapter 7 bankruptcy proceeding of John P. Raynor ("Debtor"). John P. Raynor intervened in the adversary proceeding.

DISCLOSURE STATEMENT

Counsel is a petitioner/intervener/debtor and is the husband of the Petitioner, the defendant in the adversary proceeding commenced by the Trustee.

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OPINIONS BELOW

The opinions below are:

The Eighth Circuit Court of Appeals' (the "Eighth Circuit") denial of the Petitioners' Petition for Rehearing *En Banc* on October 20, 2010. *See* Doc. G., App. 50.

The Eighth Circuit's August 23, 2010 decision applying the Modern Rule. *See* Doc. A, App. 1-15. The Circuit Judges in Petitioners' Panel were the Honorable Lavenski R. Smith, the Honorable William Duane Benton, and the Honorable Bobby E. Shepherd.

The Eighth Circuit Bankruptcy Appellant Panel's June 4, 2009 decision applying the Modern Rule. *See* Doc. B, App. 16-30.

The Nebraska Bankruptcy Court's January 26, 2007 decision applying the Modern Rule. *See* Doc. D, App. 40-47.

In an interlocutory appeal, the Nebraska Federal District Court's November 21, 2007 decision applying the Modern Rule. *See* Doc. C, App. 31-39.

JURISDICTION

The Court of Appeals denied the Petition for Rehearing on October 20, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND PROCEDURAL RULES INVOLVED

This applicable Federal limitation statute is:

11 U.S.C. § 546(a)

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of –

(1) the later of –

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

Because of the timing of the appointment of the Trustee in this case, the applicable subpart of the statute is *11 U.S.C. § 546(a)(1)(A)* – "2 years after the entry of the order for relief. . . ."

Other statutes and rules are:

28 U.S.C. § 2072(b)

(a) . . . .

(b) Such rules shall not abridge, enlarge or modify any substantive right.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) . . . .

The applicable portion of *28 U.S.C. § 2075* is –

. . . .

Such rules shall not abridge, enlarge, or modify any substantive right.

. . . .

Fed. R. Civ. P. 6(a)(1)

(a) Computing Time.

The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit.

When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a

> Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Fed. R. Bankr. P. 9006(a)(1)

> (a) Computing Time. The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time.
>
> > (1) *Period stated in days or a longer unit.* When the period is stated in days or a longer unit of time:
> >
> > > (A) exclude the day of the event that triggers the period;
> > >
> > > (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
> > >
> > > (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Petitioners' reference to *Fed. R. Civ. P. Rule 6(a)* ("Rule 6(a)") throughout this document should be construed to be a reference to *Fed. R. Bankr. P. 9006(a)*

(Bankr. Rule 9006(a)) because these rules, for this purpose, mirror one another.

STATEMENT OF THE CASE

The Jurisdiction of the Eighth Circuit Panel (the "Panel") was based on *28 U.S.C. § 158(d)(1)*, an appeal from a final order from Nebraska Bankruptcy Court involving the application of a Federal limitation statute.

This petition and the relief requested hereunder involve one and only one legal issue: whether the Standard Rule or the Modern Rule is applicable to Federal limitation statutes to determine the limitation period. This Court has held:

> . . . in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues. We have repeatedly recognized that Congress legislates against the "standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (internal quotation marks omitted); see also *Johnson v. United States*, 544 U.S. 295, 305, 125 S.Ct. 1571, 1578, 161 L.Ed.2d 542 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire

> before the claim arose); *Reiter v. Cooper*, 507 U.S. 258, 267, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993) (declining to countenance the "odd result" that a federal cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute"); *TRW Inc. v. Andrews*, 534 U.S. 19, 37, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (SCALIA, J., concurring in judgment) ("Absent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief" (internal quotation marks omitted)). Therefore, where, as the case is here, there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action (here retaliation) accrues.

See Graham County Soil & Water Conservation Dist. v. United States ex rel., Wilson, 545 U.S. 409, 418-419 (2005) (Footnote omitted).

The above passage cites Supreme Court cases decided in 1993, 1997, 2001, and 2005, ALL of which support the application of the Standard Rule (a/k/a the Traditional Rule) to ALL Federal limitation statutes with a solitary exception: that is, when the explicit language of the statute itself indicates otherwise.

This case involves a deviation from the discipline of legal reasoning which has had the effect of voiding and nullifying this Court's precedent.

Notwithstanding extensive presentation of this Court's precedent cited above, the Panel, in error, held:

> these [Supreme Court] opinions [applying the Standard Rule] do not address the calculation of bar dates for statutes of limitations provisions **stated in years**, which is the sole issue in this case. *See* Doc. A, App. 13 (Emphasis added).

The Panel's reliance upon the 'years' distinction is misplaced. *Bay Area Laundry* addressed *29 U.S.C. § 1451(f)* (6 year limitation statute); *TRW, Inc.* addressed *15 U.S.C. § 1681p* (2 years from date of discovery or 5 years from date of act giving rise to liability); and *Reiter* addressed *49 U.S.C. § 11706* (2 years). All of the foregoing cases addressed limitation statutes expressed in years, and therefore, are appropriately relevant in dispelling the Panel's argument.

Petitioners sought a Rehearing *En Banc* after another Eighth Circuit Panel addressing a federal limitation statute referred to an Eighth Circuit case cited to and relied upon by the Petitioners before their Panel but which case was ignored by the Panel in the Petitioners' case. In a highly irregular decision, the other Eighth Circuit Panel held:

> Whatever the continuing vitality of Mattson, we decline to apply its reasoning to the statute of limitations at issue in this case.

See Mader v. United States, 2010 U.S. App. LEXIS 18142 (8th Cir. Neb. Aug. 31, 2010).

As noted in Judge Beam's dissent in *Mader*, the Eighth Circuit Panel's 1992 decision in *Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259 (8th Cir. 1992), "has never been overruled by an en banc court of this circuit and must be respected by the panel majority in this case." *Mattson* applied the Standard Rule and declined to apply the *Lamb Doctrine* (e.g., *Union Nat'l Bank of Wichita Kan. v. Lamb*, 337 U.S. 38 (1949)) and *Rule 6(a)* to extend the limitation period. In Petitioners' Rehearing *En Banc* request, Petitioners asserted that the scope of this Court's decisions and reasoning as well as the Panel's error (i.e., reliance on the **years** distinction) were respectfully, forcefully and thoroughly presented. Despite being presented with conflicting decisions made by different panels within the Eighth Circuit and the overriding precedent established by this Court, the Eighth Circuit nevertheless outright rejected the Petition for Rehearing. *See* Doc. F, App. 49.

A. Factual Background.

The Petitioner J. Raynor filed bankruptcy on September 13, 2004 (NE Case No. BK04-83112 TJM). On September 13, 2006, the Trustee initiated litigation, an avoidance action (Adv. No. A06-8105) against the non-debtor spouse, Petitioner M. Raynor. After numerous failed attempts to have the Standard Rule applied and the case dismissed as time-barred, Petitioner J. Raynor intervened. After further motions narrowed the amounts at issue, the Petitioners

and the Trustee entered into a Stipulated Final Judgment, and the Bankruptcy Court approved the Stipulated Final Judgment. The Stipulated Final Judgment reserved only one issue for appeal: the limitation statute. (Adv. No. A06-8105, 03/09/2009, Filing #226, Stipulated Judgment between Plaintiff/ Trustee, Maureen Raynor, and John P. Raynor awarding judgment against, Maureen Raynor, in the amount of $76,391.12 plus interest). Petitioners appealed.

B. Proceedings Below.

From the inception of the adversary proceeding, Petitioners sought to have the Standard Rule applied and the case dismissed. Consequently, there have been two separate rounds of proceedings through the system in this case: the first round was based upon a Motion to Dismiss filed by Petitioner M. Raynor at the onset of the adversary proceeding, and the second round was initiated after a stipulated settlement resolved ALL issues except for the limitation statute issue.

The first round of the proceedings involved the Motion to Dismiss as follows:

> 1. On November 6, 2006, the Motion to Dismiss the action as time-barred was filed by Petitioner M. Raynor.
>
> 2. On January 26, 2007, the Nebraska Bankruptcy Court denied Petitioner M.

Raynor's Motion to Dismiss relying upon the Modern Rule. *See* Doc. D, App. 40-48.

3. An interlocutory appeal was taken pursuant to *28 U.S.C. § 158(a)(3)* and on November 21, 2007, the Nebraska Federal District Court entered a decision affirming the Bankruptcy Court's application of the Modern Rule. *See* Doc. C, App. 31-39.

4. On December 17, 2007, Petitioner M. Raynor filed the Writ of Mandamus pursuant to *28 U.S.C. § 1651* with the Eighth Circuit Court of Appeals, and on January 4, 2008, the Eighth Circuit **denied** the request for Mandamus without opinion. *In re: Maureen Raynor, No. 07-3919,* dated January 4, 2008. *See* Doc. E, App. 48.

5. On May 27, 2008, this Court, after conference, denied a Writ of Certiorari filed by Petitioner M. Raynor regarding the denial of the Mandamus, *Maureen Raynor, Petitioner v. United States District Court, District Of Nebraska, Respondent, No. 07-1197. See* Doc. F, App. 49.

The second round of proceedings initiated after the stipulation settlement is as follows:

a. Petitioners timely appealed to the Bankruptcy Appellant Panel (the "BAP"), and on June 4, 2009, the BAP affirmed the January 28, 2007 decision of the Bankruptcy Court rejecting the Standard Rule and applying the Modern Rule. *See* Doc. B, App. 16-30.

b. Petitioners timely appealed to the Eighth Circuit, and on August 23, 2010, the Eighth Circuit also rejected the Standard Rule and upheld the application of the Modern Rule. *See* Doc. A, App. 1-15.

c. After becoming aware of another Eighth Circuit Panel decision in *Mader*, *supra,* and Judge Beam's dissent therein, Petitioners timely filed a Petition for Rehearing *En Banc* which was denied without opinion on October 20, 2010. *See* Doc. G, App. 50.

REASONS FOR GRANTING THE PETITION

While this Court has decided that the Standard Rule is the appropriate rule to determine the limitation period under the Federal limitation statutes, the Circuit Courts have adopted the Modern Rule in a majority of the cases that have come before them involving this issue and have thereafter remained wedded to the Modern Rule even in the face of this Court's repeated decisions applying the Standard Rule. An impermissible schism results when the lower courts deviate from and do not apply the law and rules of law adopted by this Court. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) ([U]unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.).

Only those few cases that this Court accepts and which involve, in part, limitation period issues, are

assured the benefit of the Standard Rule under the law as decided by this Court. Cases that do not make it to this Court and which also involve limitation period issues, as in this case, are subjected to a different rule, i.e., the Modern Rule, in contravention to the precedential rule of law established by this Court, and therefore are effected with a very different outcome from what this Court intended by its precedent. This disparate treatment in the determination of the limitation period is an affront to the concept of equal protection under the law.

This case is ideal for addressing the ever widening impermissible schism in the judicial system on this issue and for ensuring ALL equal protection under the law because it concerns one, and only one issue to be resolved: Does the Standard Rule or the Modern Rule determine the limitation period?

THE STANDARD RULE: Pursuant to the Standard Rule, unless the language of a limitation statute provides otherwise, a limitation period commences when the party has a complete and present cause of action. *See Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.); *Graham County Soil & Water Conservation Dist. v. United States ex rel., Wilson*, 545 U.S. 409, 418 (2005) (We have repeatedly recognized that Congress legislates against the "standard rule that

the limitations period commences when the plaintiff has a complete and present cause of action."); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become "complete and present" for limitations purposes until the plaintiff can file suit and obtain relief.); and, a concurring opinion cited in *Graham County Soil*, *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (*Bay Area Laundry* quoted approvingly our statement in *Clark v. Iowa City*, 87 U.S. 583, 20 Wall. 583, 589, 22 L. Ed. 427 (1875), that "all statutes of limitation begin to run when the right of action is complete. . . ." This is unquestionably the traditional rule: absent other indication, a statute of limitations begins to run at the time the plaintiff "has the right to apply to the court for relief. . . ." 1 H. Wood, Limitation of Actions § 122a, p. 684 (4th ed. 1916).).

Graham County Soil further emboldened the Standard Rule by referring to the rule as the "default rule" (545 U.S. at 518) and mandating the application of the Standard Rule "where . . . there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action . . . accrues" (545 U.S. at 519).

The implication of the reference to the "default rule" used in *Graham County Soil* and phrases such as "Congress legislates against the standard rule" in *Graham County Soil*, "Unless Congress has told us

otherwise in the legislation at issue" in *Bay Area Laundry*, "absence of any such indication in the statute" in *Rieter*, and "all statutes of limitation begin to run when the right of action is complete" in *Clark* (cited to two of these recent cases), is that:

> a. the Standard Rule applies to all Federal limitation statutes excepting only statutes in which the explicit language of the limitation statute provides otherwise; and
>
> b. when the statutory language is ambiguous, the Standard Rule is applied.

In contrast, the Modern Rule resorts to and relies upon *Rule 6(a)* which is contrary to the foregoing decisions of this Court, the propagator of *Rule 6(a)*.

THE MODERN RULE: The Modern Rule applies *Rule 6(a)* in two ways: **first**, to separate the commencement of a limitation period from the accrual of the cause of action by one day and **second**, to add days at the end of a limitation period if the limitation period ends on a Saturday, Sunday, or a legal holiday as necessary, to include the next business day. Pursuant to the Modern Rule, the first year (and only the first year in a multi-year limitation statute) effectively becomes a 366-day year with the anniversary date of the accrual of the cause of action constituting the last day of the first year. If a one year limitation period is applicable and the anniversary day happens to end on a Saturday, the limitation period can become a 369-day year, e.g., Sunday (367th day) followed legal holiday (368th day) means the next Tuesday (369th day) is the last day

of the limitation period. Cases premised upon the same cause of action and the same limitation statute have different limitation periods depending upon the day the limitation period ends.

The Modern Rule is premised upon this Court's decision in *Union Nat'l Bank of Wichita Kan. v. Lamb*, 337 U.S. 38 (1949). *Lamb* did not involve a limitation statute nor has this Court, since 1949, ever cited *Lamb* when interpreting a limitation statute. The Circuit Courts' reliance upon *Lamb* is misplaced.

In the movement from the Standard Rule to the Modern Rule by the Circuit Courts, the earlier Circuit Court decisions cite *Lamb,* while later Circuit Court decisions simply cite to *Rule 6(a)* as support. Ignoring cases involving the Judicial grace period for the Antiterrorism and Effective Death Penalty Act cases (a grace period is not a limitation statute), the following cases represent the evolvement of the adoption (based upon Petitioner's research) of the Modern Rule in civil cases by the Circuit Courts, to wit:

– Cases which cited *Lamb* as supporting their decision:

YEAR	*Citation: (to decision but not to Lamb)*
1949	*Simon v. Commissioner*, 176 F.2d 230, 232 (2d Cir. 1949)
1951	*Wilkes v. United States*, 192 F.2d 128, 129 (5th Cir. 1951)
1955	*United States v. Peters*, 220 F.2d 544, 546 (10th Cir. 1955)

1967 *Wirtz v. Peninsula Shipbuilders Assoc.*, 382 F.2d 237, 240 (4th Cir. 1967)

1984 *Frey v. Woodard*, 748 F.2d 173, 175 (3d Cir. 1984)

1989 *United Mine Workers, International Union v. Dole*, 870 F.2d 662, 665 (D.C. Cir. 1989)

1993 *Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961, 964 (Fed. Cir. 1993)

1995 *Bartlik v. United States DOL*, 62 F.3d 163, 166 (6th Cir. 1995)

2010 *Mader v. United States*, 2010 U.S. App. LEXIS 18142 (8th Cir. Neb. Aug. 31, 2010)

– Cases which did not cite *Lamb*, but relied upon *Rule 6(a)*:

1982 *Harbor Nat'l Bank v. Sid Kumins, Inc.*, 696 F.2d 9 (1st Cir. 1982)

1987 *Tribue v. United States*, 826 F.2d 633, 635 (7th Cir. 1987)

1988 *Maahs v. United States*, 840 F.2d 863 (11th Cir. 1988)

2002 *Sain v. City of Bend*, 309 F.3d 1134, 1136-1137 (9th Cir. 2002)

2010 *In re Raynor*, 2010 U.S. App. LEXIS 17596 (8th Cir. Aug. 23, 2010)

In the order of adoption, the 2nd, 5th, 10th, 4th, 3rd, D.C., Federal, 6th, and the 8th Circuit Courts of Appeals adopted the Modern Rule relying, in part, upon this Court's decision in *Lamb*. The Circuit Courts which cited only *Rule 6(a)* in the order of their

adoption of the Modern Rule are the 1st, 7th, 11th, 9th, and 8th Circuit Courts of Appeals. Note that the Sixth Circuit's 1995 decision was the last Circuit Court to adopt the Modern Rule while citing *Lamb* and the Ninth Circuit adoption of the Modern Rule in 2002 citing to *Rule 6(a)* occurred **before** this Court's 2005 decision in *Graham County Soil* where this Court held:

> . . . in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues. We have repeatedly recognized that Congress legislates against the "standard rule that the limitations period commences when the plaintiff has a complete and present cause of action."

See 545 U.S. at 518.

Two Eighth Circuit cases are cited under the rationale that the action of five of six Circuit Court Judges addressing the issue form a plurality by agreeing in *Mader* and *Raynor* that *Rule 6(a)* determines when a limitation period commences.

It would be unfair to represent that the above Circuit Courts did not, in some cases, apply the Standard Rule. The correct characterization is that the Modern Rule is the Circuit Courts' "default rule."

MODERN RULE – RELIANCE UPON RULE 6(a) IS ERROR: A 1992 Eighth Circuit decision approached the *Rule 6(a)* argument simply, directly and correctly stating that "the Supreme Court decision in

Lamb, supra, is distinguishable because it applies 'only to proceedings had after the institution of the suit, such as the taking of an appeal, and has no application to the late institution of an action.'" *See Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259, 262 (8th Cir. 1992) (Citation omitted). *Mattson* also cited *Fed. R. Civ. P. 82.* The applicable portion of *Rule 82* provides: "These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." *Rule 82* bankruptcy counterpart is *Fed. R. Bankr. P. 9030.*

The reasoning in *Mattson* about the import of the Procedural Rules finds support in this Court's opinions. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) ("Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." 4 C. Wright & A. Miller, Federal Practice and Procedure § 1057, p. 191 (1969).). Because *Rule 6(a)* does not become relevant until *Fed. R. Civ. P. 3* becomes applicable, pursuant to *Walker*, *Rule 6(a)*'s "primary purpose" is measuring "time periods that begin running from the date of commencement" of the suit. It is inconsistent with the reasoning of this Court in *Walker* to hold that *Rule 6(a)* reaches-back, after *Rule 3* is invoked, to determine a Federal limitation period.

Likewise, *Mattson's* reliance upon *Rule 82* or reliance upon *28 U.S.C. § 2072(b)* is supported by this

Court's decisions. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (What matters is what the rule itself *regulates*: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.). In this case, the Panel stated:

> We . . . hold that *§ 546(a)* is *not* jurisdictional and thus *Rule 9006(a)* is the proper time-calculation method to use when applying *§ 546*'s limitations period.

See Doc. A, App. 10-11.

When a Rule is the only reason a stale claim is prosecuted, the Rule extends far beyond governing only "the manner and the means" it invalidates an affirmative defense that has been timely raised. Invalidating an affirmative defense that is determinative of the litigation clearly alters "the rules of decision by which [the] court will adjudicate [those] rights." Applying *Bankr. Rule 9006(a)* in this manner violates *Bankr. Rule 9030* and *28 U.S.C. § 2075*.

The Panel's reliance upon jurisdictional rationale is also misplaced. Petitioners do not contest that an affirmative defense can be waived or that the parties to the dispute can toll limitation statute's application. Each of the foregoing involves consent, either implied or express. Because Petitioners can consent does not mean the Panel **can mandate their consent**. It is inconceivable that a court reasons that the concept of

consent, that is volitional, supports involuntarily submitting to the prosecution of a stale claim. Does that mean because Petitioners can surrender their citizenship, the court has a right to involuntarily strip Petitioners of their citizenship? Common sense is missing.

THE PANEL'S REASONING: The Panel held that the language of *Code § 546(a)(1)(A)*, "2 years after the entry of the order for relief," means in this case, when an order for relief is entered on September 13, 2004, the word "after" means the limitation period commences September 14, 2004. Specifically, the Panel held:

> Thus, we conclude that "*after* September 13" is September 14 and thereafter, meaning that any action filed prior to September 14, 2006, would not be time-barred.

See Doc. A, App. 7-8.

The above interpretation can only be reached by adding language to the statute because the statutory language **references an event and not a day**. For example, the bracketed language must be inserted to support the Panel's reasoning:

> 2 years after the [day of the] entry of the order for relief. . . .
>
> Otherwise the statute must be rewritten –
>
> 2 years after the [day] ~~entry of~~ the order for relief [is entered]. . . .

The Panel extended the limitation period by reading words into the statute. *See Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."). The Panel is rewriting the legislation. Query: what is the meaning of "after" if the petition was filed on September 17, 2004, a Friday? Is the next step to find that the limitation period doesn't commence until Monday, September 20, 2004, adding more days on the front end of a limitation period?

Nowhere in its decision did the Panel argue that the cause of action did not accrue on September 13, 2004.

Further, Congress has determined, in *Code § 546(a)(1)(B),* that in many cases, a one year limitation period is applicable. The Trustee in this case was appointed on June 3, 2005. *See* Doc. D, App. 41. Applying the Standard Rule, the Trustee had more than the one year that was provided pursuant to subsection (B) of Code § 546(a)(1) or 467 days, but nevertheless, instigated the litigation on September 13, 2006. The action is time-barred.

Lastly, the Panel's decision in this case is also in conflict with another Eighth Circuit Panel's decision made in *McCuskey v. Central Trailer Servs.*, 37 F.3d 1329 (8th Cir. 1994). In dealing with the predecessor

statute of *Code § 546*, i.e., *§ 546* before the 1994 Amendments, the Eighth Circuit held "[i]n particular, we agree that a 'plain reading of *section 546(a)* is that the two-year statute of limitations begins running from the date the first trustee is appointed . . . '." *McCuskey* at 1332. Since the subsequent amendments to the Bankruptcy Code did not conflict with the holding in *McCuskey*, its holding has been recognized as having continuing applicability. *See Lee v. National Home Ctrs., Inc. (In re Bodenstein)*, 253 B.R. 46, 50 (B.A.P. 8th Cir. Ark. 2000) (Citing *McCuskey*, the Court held that the plain language of Section 546(a) makes it clear that the statute of limitations runs from the date the first trustee is appointed.). The continuing applicability of *McCuskey* has led to absurd results when *Code § 546(a)(1)(A)* is governed by the Modern Rule and *Code § 546(a)(1)(B)* is governed by the Standard Rule. *See In re Olsen*, 2001 Bankr. LEXIS 2142 (Bankr. D. Neb. Oct. 26, 2001). However, the *McCuskey* holding was resolved by this Panel, like *Mattson*, by turning a blind eye to the decision and setting aside Petitioners' indefeasible right to have current precedent applied absent an *en banc* ruling.

THE PANEL AND *STARE DECISIS*: In a decision rendered by an Eighth Circuit panel in 2000, the Eighth Circuit held:

> Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial

> power beyond the bounds of Article III, and is therefore unconstitutional.

See Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000).

The opinion in *Anastasoff* was withdrawn because a Rehearing *En Banc* petition was granted. *See Anastasoff v. United States*, 2000 U.S. App. LEXIS 33247 (8th Cir. 2000).

The opinion in *Anastasoff* is a dissertation on the force and effect of Doctrine of *Stare Decisis*.

Now, less than ten years later, the Eighth Circuit has retreated from *Anastasoff* and the import of precedent by ignoring citations to *Mattson* and *McCuskey* and also, by not granting Petitioners' request for a Rehearing *En Banc* notwithstanding Judge Beam's dissent citing *Mattson*. Justice Frankfurter, in a concurring opinion, stated:

> Rehearings *en banc* by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern.

See Western P. R. Corp. v. Western P. R. Co., 345 U.S. 247, 270 (1953).

In addition to arguing conflicts with the Eighth Circuit's own precedent, the Petitioner went to great lengths to argue that it is not just this Court's decisions that are binding but also this Court's mode of analysis.

The Eighth Circuit adopted the Modern Rule years after the majority of circuits adopted it (see table above), but unlike the Eighth Circuit, those circuits did not have the benefit of *Reiter* decided by this Court in 1993; *Bay Area Laundry* decided by this Court in 1997; *TRW Inc.* decided by this Court in 2001; *Graham County Soil* decided by this Court in 2005, and a number of other cases decided by this Court upholding the application of the Standard Rule in determining limitation periods. Additionally, when statutory interpretation is involved as in this case, *Stare Decisis* has more force and effect. *See Ill. Brick Co. v. Ill.*, 431 U.S. 720, 736 (1977) (Considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change the court's interpretation of its legislation.). The metamorphosis in jurisprudence of the Eighth Circuit from *Anastasoff*, on the one hand, to *Mader* and *Raynor*, on the other hand, is incongruent especially given the plain language of this Court's precedent. *See Hutto v. Davis,* 454 U.S. 370, 374-375 (1982) (More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress.).

Even the Appellee's brief submitted to the Panel provided:

> While the U.S. Supreme Court cases cited by the Appellant **adopt the traditional rule** and hold that the statute of limitations begins to run at the time the plaintiff has the

> right to apply for relief rejecting attempts to extend the bar date to file an action on the basis of the injury discovery rule and other exceptions, these opinions do not address the calculation of bar dates for statutes on limitations provisions stated in years.

See Appellee's Brief, Case: 09-2464 Page: 16 Date Filed: 08/19/2009 Entry ID: 3578437 (Emphasis added).

Notwithstanding that there was NO disagreement that this Court applied the Standard Rule (a/k/a the Traditional Rule), the Panel held:

> these [Supreme Court] opinions do not address the calculation of bar dates for statutes of limitations provisions **stated in years**, which is the sole issue in this case. *See* Doc. A, App. 13 (Emphasis added).

The Panel's reliance upon the **years** distinction is misplaced. *Bay Area Laundry* addressed *29 U.S.C. § 1451(f)* (6 year limitation statute); *TRW, Inc.* addressed *15 U.S.C. § 1681p* (2 years from date of discovery or 5 years from date of act giving rise to liability); and *Reiter* addressed *49 U.S.C. § 11706* (2 years). All of these cases addressed limitation statutes expressed in years, and therefore, are appropriately relevant in dispelling the Panel's argument. Further, this Court's all-encompassing language quoted by Petitioners to the Panel did not support the **years** distinction, yet Petitioners' efforts were of no avail thus requiring this application to be presented to this

Court. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (Needless to say, only this Court may overrule one of its precedents.).

LIMITATION STATUTES REPRESENT PUBLIC POLICY: In *Chase Securities Corporation v. Donaldson,* 325 U.S. 304, 314 (1945), this Court held:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They represent a **public policy** about the privilege to litigate (Citations omitted; Emphasis added).

The Eighth Circuit, citing to this Court's precedent, has held that "strict adherence to such limitations periods 'is the best guarantee of evenhanded administration of the law.'" *See Union Pac. R.R. v. Beckham*, 138 F.3d 325, 330 (8th Cir. 1998), citing to *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980).

Limitation statutes are public policy determining when the right to litigate has ended.

"The purpose of the Bankruptcy Code is to provide the honest debtor with a 'fresh start'." *See* 1 Bankruptcy Practice Handbook § 6:30 (2d ed.).

Both the public policy behind the Congressional adoption of limitation statutes as well as the fresh start purpose of the bankruptcy code augment the

reasons why this Court should grant the requested relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

November 9, 2010

Respectfully submitted,

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APPENDIX A

In re: John P. Raynor, Debtor.
Richard D. Myers, Trustee of the John P. Raynor Chapter 7 Bankruptcy, Appellee,
v.
Maureen Raynor;
John Patrick Raynor, Appellants.

No. 09-2464

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

***2010 U.S. App. LEXIS 17596*;**
***Bankr. L. Rep. (CCH) P81,836*;**
53 Bankr. Ct. Dec. 144

March 9, 2010, Submitted
August 23, 2010, Filed

COUNSEL: For Richard D. Myers, Trustee of the John P. Raynor Chapter 7 Bankruptcy, Appellee: Robert Lawrence Lepp, Alan E. Pedersen, MCGILL & GOTSDINER, Omaha, NE.

For Maureen Raynor, Appellant: John Patrick Raynor, RAYNOR & RENSCH, Omaha, NE.

John Patrick Raynor, Appellant, Pro se, Omaha, NE.

JUDGES: Before SMITH, BENTON, and SHEPHERD, Circuit Judges.

OPINION BY: SMITH

OPINION

SMITH, Circuit Judge.

Randy Myers, a Chapter 7 trustee, brought an adversary proceeding to avoid certain transfers that debtor John Raynor ("John") had made to his wife, Maureen Raynor ("Maureen"). The district court upheld the bankruptcy court's denial of Maureen's motion to dismiss the suit as time-barred by the statute of limitations. John intervened and filed his own motion to dismiss the trustee's claims as untimely. The bankruptcy court denied this motion. The trustee and debtors then entered into a stipulated judgment, with the debtors reserving the right to appeal the timeliness issue to an Eighth Circuit Bankruptcy Appellate Panel (BAP). On appeal, the BAP affirmed the stipulated judgment entered by the bankruptcy court, ruling that the BAP must defer to the district court's original determination that the cause of action was not time-barred and, pursuant to the law of the case doctrine, declined to revisit the issue. The debtors appeal the decision of the BAP, again arguing that the statute of limitations barred Myers's avoidance suit. We affirm.

I. *Background*

On September 13, 2004, John filed a voluntary Chapter 11 bankruptcy petition,[1] and Myers was

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[1] John later converted his petition to a Chapter 7 petition.

appointed trustee. On September 13, 2006, Myers filed an adversary proceeding against Maureen, seeking to avoid several transfers John made to Maureen. Maureen filed a motion to dismiss the trustee's suit as time-barred under 11 U.S.C. § 546(a), which the bankruptcy court denied. Maureen brought an interlocutory appeal to the district court, which in a November 21, 2007 order affirmed the bankruptcy court's orders denying Maureen's motion to dismiss. The district court concluded that Myers timely filed the adversary proceeding because the time-computation rules found in Federal Rule of Bankruptcy Procedure 9006(a) applied to the case and therefore calculation of the limitations period found in § 546(a) would begin on the day following the date the bankruptcy petition was filed – September 14, 2004 – and end on the anniversary date of the petition filing – September 13, 2006. This court and the Supreme Court denied Maureen's petitions for mandamus and certiorari, respectively.

Eventually, on October 6, 2008, John filed a motion to dismiss, again on the basis that Myers's motion was time-barred. The bankruptcy court denied John's motion. The Raynors jointly appealed this order to the BAP, which denied the Raynors' motion for leave to take an interlocutory appeal and dismissed the appeal. This court also denied the petition for permission to appeal.

The Raynors then filed a stipulated judgment with the bankruptcy court, settling the avoidance suit for $ 76,391.12. The stipulated judgment allowed for

the Raynors to appeal the timeliness issue to the BAP and then pursue an appeal of the BAP decision to this court.

The BAP affirmed the stipulated judgment entered by the bankruptcy court, deferring to the district court's November 21, 2007 determination that the cause of action was not time-barred and, pursuant to the law of the case doctrine, declined to revisit the issue.[2]

II. *Discussion*

The Raynors argue that the BAP erred in finding that the trustee's September 13, 2006 complaint was timely filed under Rule 9006(a) and § 546(a). The Raynors assert that Supreme Court precedent holds that a limitations period must begin to run the day that the cause of action accrues and therefore the BAP erroneously held that the period began the day after the cause of action accrued. Myers maintains that under the computation rules of Rule 9006(a) the statute of limitations had not run until September 14, 2004, so a complaint for relief filed on the anniversary date of the entry of the order – September 13, 2004 – is timely.

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[2] The district court in this case was sitting as the appellate court.

A. *Law of the Case*

As an initial concern, we address Myers's argument that we should not review this matter because of the law of the case doctrine. We disagree. "Law of the case" is a policy of deference under which "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); *see also Little Earth of the United Tribes, Inc. v. United States Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1438 (8th Cir. 1986) ("The law of the case doctrine applies to issues implicitly decided in earlier stages of the same case."). The law of the case "prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy." *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir. 1995). We have held that "[w]hen an appellate court remands a case . . . all issues decided by the appellate court become the law of the case. . . ." *Id.*

"Law of the case terminology is often employed to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system." *Id.* (internal quotations and citation omitted). "When an appellate court remands a case to the district court, all issues decided by the appellate court become the law of the case, and the district court on remand must adhere to any limitations imposed on its function at resentencing by the

appellate court." *Id.* (internal quotations and citations omitted). In fact, all the cases that Myers cites in support of his argument that we decline review concern inferior courts following the decisions of superior courts. Myers, in essence, asks that we construe the doctrine to hold the opposite – that superior courts are bound by decisions of inferior courts which act as appellate courts. Myers misconstrues the law of the case doctrine. As the reviewing court, we are bound by neither the district court nor the BAP decision.

The law of the case doctrine is inapplicable to this case. This case involves direct appellate review by this court of trial and intermediary appellate decisions. In doing so, we are not bound by the decisions of inferior courts, even lower courts acting as an appellate court. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) ("Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a [BAP's] adherence to the law of the case cannot insulate an issue from [a superior court's] review.").

B. *Statute of Limitations*

Having concluded that we are not bound by any previous decisions in this case, we turn to the sole issue on appeal – whether Myers's September 13, 2006 complaint is time-barred by § 546. As this case presents an issue of statutory interpretation, our

review is de novo. *United States v. Templeton*, 378 F.3d 845, 849 (8th Cir. 2004). In addition, "[t]he issue of whether a suit is time-barred is a question of law. . . ." *McCord v. Minn. Mut. Life Ins. Co. Sales Practices Litig. (In re Minn. Mut. Life Ins. Co. Sales Practices Litig.)*, 346 F.3d 830, 835 (8th Cir. 2003). We review questions of law de novo. *DeBold v. Case*, 452 F.3d 756, 761 (8th Cir. 2006).

1. *Statutory Construction*

The Raynors argue that the trustee's suit against Maureen – which was filed on the two-year anniversary date of the Raynor's petition – is time-barred by § 546 of the Bankruptcy Code because it was filed "2 years after the entry of the order of relief."

> Section 546 provides, in relevant part:
>
> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after . . .
>
> (1) the later of –
>
> (A) 2 years after the entry of the order for relief. . . .

We construe the plain language of § 546 to set the statute of limitations period as a full two years, which we conclude in this case, would last from September 13, 2004, to September 13, 2006. The statute plainly forbids commencement of an action *after* "2 years after the entry of the order for relief. . . ." Thus, we conclude that "*after* September 13" is September 14

and thereafter, meaning that any action filed prior to September 14, 2006, would not be time-barred. "When we find the terms of a statute unambiguous, judicial inquiry is complete. . . ." *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981). Therefore, under this plain-language review, we hold that Myers's complaint was timely, as it was filed before midnight on the anniversary date of the entry of the order for relief; in other words, by 11:59 p.m. on September 13, 2006. This is not a novel interpretation of this statute. *See also Callahan v. Moore (In re Gen. Creations, Inc.)*, 343 B.R. 548, 552 (Bankr. W.D. Va. 2006) (holding that where order for relief was entered on July 22, 2003, "the statute of limitations set forth in 11 U.S.C. § 546(a)(1)(A) ended at midnight on July 22, 2005"); *In re Steck*, 298 B.R. 244, 249 (Bankr. D.N.J. 2003) (holding that where the order for relief was entered on October 10, 2000, "the trustee had to commence an avoidance action *no later* than October 10, 2002") (emphasis added).

Myers proffers an alternative approach to calculating the appropriate limitations period. Myers asserts that Rule 9006(a) of the Federal Rules of Bankruptcy Procedure (adopting Rule 6(a) of the Federal Rules of Civil Procedure) governs the computation of time when a period of time to take action is prescribed by an applicable statute, such as § 546.

The relevant portion of Rule 9006 provides:

(a) Computing time

> The following rules apply in computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or *in any statute* that does not specify a method of computing time.
>
> (1) Period stated in days or a longer unit
>
> When the period is stated in days or a longer unit of time:
>
> (A) exclude the day of the event that triggers the period;
>
> (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
>
> (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(Emphasis added.)

If Rule 9006(a) applies, Myers's complaint is still timely. Rule 9006(a) states that "the day of the event that triggers the period" – September 13, 2004 – shall *not* be included in the computation of the statute of limitations, meaning that the limitations period must begin, at its earliest, on the next day, September 14. Under this analysis, the limitations period in § 546 – "2 years after the entry of the order for relief" –

certainly would not have expired on September 13, 2006.

In deciding whether Rule 9006(a) applies to § 546, which is at the core of the parties' disagreement, we address for the first time the specific question of whether § 546(a) is jurisdictional or simply a statute of limitations. A time-computation rule, such as Rule 9006, is to be applied only when a statute of limitations is not jurisdictional. *See* Fed. R. Civ. P. 82 (preventing the use of the Rules of Civil Procedure to extend the jurisdiction of United States district courts); *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999) ("[B]efore determining whether we should apply [a time-computation statute] to the one-year time limit in § 2255, we must first determine whether that time limit is jurisdictional."). Therefore, if § 546 is not jurisdictional, the limitations period time-counting would start per Rule 9006(a) on the day following the date the petition was filed and end on the anniversary date of the petition filing.

We have not previously addressed this exact issue. We do so now and agree with a majority of courts that have addressed the applicability of Rule 9006(a) to § 546(a)[3] and hold that § 546(a) is *not*

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[3] *See Pugh v. Brook (In re Pugh)*, 158 F.3d 530, 534-36 (11th Cir. 1998) (holding that the limitations period in 11 U.S.C. § 546(a) is a waivable statute of limitations subject to estoppel and equitable tolling, not a jurisdictional bar); *Callahan v. Moore (In re Gen. Creations, Inc.)*, 343 B.R. 548, 550 (Bankr. W.D. Va. 2006) ("Rule 9006(a) of the Federal Rules of Bankruptcy

(Continued on following page)

jurisdictional and thus Rule 9006(a) is the proper time-calculation method to use when applying § 546's limitations period. Applying Rule 9006(a), the limitations period in § 546(a) would begin on the day following the date the petition was filed – September 14, 2004 – and end on the anniversary date of the petition filing – September 13, 2006 – making Myers's September 13, 2006 filing of the adversary proceeding against Maureen Raynor timely.

Finally, we note that the plain language of Rule 9006 shows that it applies in this case regardless of how § 546(a) is characterized. By its own terms, Rule 9006 applies to "any statute that does not specify a method of computing time." Section 546 does not contain a method of computing time, making Rule 9006(a) applicable. *See Grella v. Zimmerman (In re*

Procedure governs the computation of time when a period of time to take action is prescribed by an applicable statute, such as 11 U.S.C. § 546."); *S. Technical Coll. Inc. v. Ark. Television Co. (In re S. Technical Coll., Inc.)*, 172 B.R. 253, 254 (Bankr. E. D. Ark. 1994) (applying Rule 9006(a) to two-year limitations period in § 546 and finding that date on which bankruptcy petition was filed was excluded from two-year period in deciding whether avoidance proceeding was timely); *Boatman v. Furnia (Matter of Sutera)*, 157 B.R. 519, 523 (Bankr. D.Conn. 1993) ("Congress intended that the Federal Rules of Bankruptcy Procedure be applicable in full, and without exception, to all provisions of the Bankruptcy Code, and that Rule 9006(a) shall apply to . . . § 546(a)."); *Amdura Corp. v. Faegre & Benson (In re Amdura Corp.)*, 142 B.R. 433, 435 (Bankr. D. Colo. 1992) (stating that "an abundance of case law in other circuits" supports idea that Rule 9006(a) applies to calculation of two-year statute of limitations in § 546(a)).

Art & Co., Inc.), 179 B.R. 757, 762 (Bankr. D. Mass. 1995) ("However, by its own terms, Rule 9006 applies to the computation of time '*under any applicable statute*', which obviously includes Bankruptcy Code Section 546(a).").

In conclusion, we hold that the plain language of § 546(a) provides that a complaint filed on the two-year anniversary of the entry of the order for relief, such as Myers's complaint, is not time-barred. Additionally, the time-computation rules of Rule 9006(a) apply to § 546, also making Myers's complaint timely.

2. *Supreme Court Precedent*

The Raynors also argue that Supreme Court case law requires a different result. The Raynors maintain that the accrual of a cause of action and the commencement of a statute of limitations statute begin together and that Supreme Court case law supports such construction (referred to by the Raynors as the "traditional rule"). The Raynors contend that Myers relied upon what they describe as the "modern rule" to separate the date of accrual of the cause of action from the commencement of the limitation statute by one day.

The Supreme Court decisions cited by the Raynors that employ the "traditional rule" for determining jurisdictional issues are inapposite and do not resolve this case in the Raynors' favor. *See Graham County Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 125 S. Ct. 2444, 162 L. Ed. 2d

390 (2005); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal, Inc.*, 522 U.S. 192, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997). The Supreme Court cases cited by the Raynors do, as the Raynors assert, employ the rule that the statute of limitations begins to run at the time the plaintiff has the right to apply for relief, thus rejecting attempts to extend the bar date to file an action on the basis of the injury discovery rule and other exceptions. *Graham County*, 545 U.S. at 418; *Bay Area Laundry*, 522 U.S. at 201. However, these opinions do not address the calculation of bar dates for statutes of limitations provisions stated in years, which is the sole issue in this case.

The Supreme Court has stated that "the default rule [is] that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham County*, 545 U.S. at 418. "[The Court has] repeatedly recognized that Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Id.* (internal quotations and citation omitted). However, the argument in this case is not that the limitations period should be tolled until there is a complete and present cause of action but instead that the proper limitations statute and time-calculating method are found in § 546 and Rule 9006(a).

Applying Rule 9006(a) does not run afoul of *Graham*. Rule 9006 does not change any rule that the limitations period commences when the cause of

action accrues; it simply provides a method to calculate that limitations period's precise dimensions. Therefore, Rule 9006(a) does not change the actual *length* of the limitations period, which is what the "traditional rule" warns against. Additionally, *Graham* considered a different issue: whether the six-year statute of limitations under the False Claims Act controlled retaliation claims under 31 U.S.C. § 3730(h) or if such a claim should be controlled by a shorter statute of limitations set by state law. *Id.* In *Graham*, the Supreme Court reconciled two plausible constructions of a statute of limitations, but in this case there is only one plausible construction of § 546(a). *See id.* at 419 ("[W]here, as the case is here, there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action . . . accrues."). *Graham* is therefore distinguishable.

The Raynors also cite in support *Bay Area Laundry*. In that case, the Supreme Court construed a statute of limitations under the "traditional rule" to avoid a situation where the limitations period might begin to run before a cause of action had ever accrued. 522 U.S. at 201. In a subsequent case, the Court noted that "[t]he question presented in *Bay Area Laundry* was whether a statute of limitations could commence to run on one day while the right to sue ripened on a later day. We answered that question, and only that question, 'no,' unless the statute indicates otherwise." *TRW Inc. v. Andrews*, 534 U.S. 19, 34 n.6, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001).

Again, the question we address was not presented in *Bay Area Laundry*, making the case inapposite.

III. *Conclusion*

For the reasons stated, we affirm.

APPENDIX B

In re: John Patrick Raynor, Debtor.
Richard D. Myers, Trustee, Plaintiff-Appellee,
v.
Maureen Raynor, Defendant-Appellant,
John Patrick Raynor,
Intervenor defendant-Appellant.

No. 09-6012

UNITED STATES
BANKRUPTCY APPELLATE PANEL
FOR THE EIGHTH CIRCUIT

406 B.R. 375; 2009 Bankr. LEXIS 1301;
62 Collier Bankr. Cas. 2d (MB) 96;
51 Bankr. Ct. Dec. 190

April 27, 2009, Submitted
June 4, 2009, Filed

COUNSEL: For Richard D. Myers, Trustee of the John P. Raynor Chapter 7 Bankruptcy, Plaintiff-Appellee: Robert Lawrence Lepp, Alan E. Pedersen, MCGILL & GOTSDINER, Omaha, NE.

For Maureen Raynor, Defendant-Appellant: John Patrick Raynor, RAYNOR & RENSCH, Omaha, NE.

John Patrick Raynor, Intervenor defendant-Appellant, Pro se, Omaha, NE.

JUDGES: Before KRESSEL, Chief Judge, SCHERMER and VENTERS, Bankruptcy Judges.

OPINION BY: KRESSEL

OPINION

KRESSEL, Chief Judge.

Maureen Raynor and John P. Raynor appeal the bankruptcy court's[1] stipulated judgment order of March 9, 2009. Because we defer to the previous appellate decision of the district court[2] that the trustee's suit was not time-barred, we affirm.

BACKGROUND

John Patrick Raynor filed a voluntary chapter 11 bankruptcy petition on September 13, 2004. On June 2, 2005, the court granted John's motion to convert his case from chapter 11 to chapter 7. Richard D. Myers was appointed trustee. On September 13, 2006, the second anniversary of the filing of John's petition, Myers filed an adversary proceeding against John's wife, Maureen Raynor, seeking to avoid several transfers[3] of real property and marketable securities made by John to Maureen. On November 6, 2006, Maureen filed a motion to dismiss the trustee's

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[1] The Honorable Timothy J. Mahoney, United States Bankruptcy Judge for the District of Nebraska.

[2] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

[3] The complaint included five counts: I, preferential transfers to or for the benefit of an insider within one year of date of bankruptcy petition (11 U.S.C. § 547); II, III and IV, avoidance and recovery of constructively fraudulent transfers (11 U.S.C. §§ 544, 548, 550, & 551 and § 36-705 of the Nebraska UFTA); and V, improper, unauthorized post-petition transfers.

suit as time-barred. On January 26, 2007, the court denied the motion. On February 5, 2007, Maureen filed a motion for reconsideration. The motion was denied on March 27, 2007.

Maureen brought an interlocutory appeal to the district court. The issue considered by the district court was whether the trustee's suit was time-barred under 11 U.S.C. § 546(a). On November 21, 2007, the district court affirmed[4] the bankruptcy court's orders denying Maureen's motions to dismiss and for reconsideration. The district court concluded that the adversary proceeding had been filed timely because "11 U.S.C. § 546(a) is not jurisdictional, the time-computation rules of Bankruptcy Rule 9006(a) apply, and calculation of the limitations period in 11 U.S.C. § 546(a) would begin on the day following the date the petition was filed – September 14, 2004 – and end on the anniversary date of the petition filing – September 13, 2006." Maureen petitioned the Eighth Circuit Court of Appeals for writ of mandamus. Her petition was denied on January 4, 2008. Maureen then petitioned to the Supreme Court for a writ of certiorari, but the petition was denied on May 27, 2008.

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[4] *Myers v. Raynor (In re Raynor)*, No. 8:07CV151, 2007 U.S. Dist. LEXIS 86324 (D. Neb. Nov. 21, 2007).

John intervened[5] in the suit against Maureen and filed his own motion to dismiss the suit on June 30, 2008, on the basis that the trustee's pleadings "do not state with particularity the circumstances constituting fraud in violation of F. R. Civ. Pro. 9(b) ("Rule 9") (made applicable by F. R. Bankr. P. 7009)" and "are baseless and unsupportable allegations filed in violation of F. R. Bankr. P. 9011 (Rule 11")." On July 10, 2008, John withdrew his motion to dismiss and filed a motion to strike the trustee's pleadings pursuant to Bankruptcy Rules 7009 and 9011. John's motion to strike was denied on September 19, 2008.

On October 6, 2008, John filed another motion to dismiss on the basis that the trustee's motion was time-barred, arguing that there existed "New law stemming from the passage of the BAPCPA, the Bright Line Rule, which is determinative of this matter" and on the basis of "Authority of the Eighth Circuit Bankruptcy Appellant Panel, not previously considered by this Court which is determinative of this matter." On October 27, 2008, the bankruptcy court denied John's motion. The court addressed John's arguments but declined to reconsider its previous determination that the suit was not time-barred. The Raynors jointly appealed the October 27, 2008 order to the bankruptcy appellate panel. However, on December 4, 2008, we denied the Raynors'

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[5] John's standing is unclear to us, since the complaint seeks no relief against him.

motion for leave to take an interlocutory appeal and dismissed the appeal. The Raynors filed a petition with the Eighth Circuit Court of Appeals for permission to appeal our October 27, 2008 order. On January 16, 2009, the Court of Appeals denied the Raynors' petition.

On March 9, 2009, the trustee and Maureen filed a stipulated judgment, settling the avoidance suit for $ 76,391.12. It stated that "no appeal of any issue will be taken except that the Defendant and Intervenor shall maintain the right to file an appeal to the Eighth Circuit Bankruptcy Appellate Panel ("BAP"), limited to the statute of limitations issue, and the Plaintiff shall maintain the right to argue that the decisions issued in the prior appeal on the statute of limitations issue should be controlling in this case." The stipulated judgment further provided, "Any party to this adversary may pursue such further appeal of the BAP's decision to the Eighth Circuit and/or the U.S. Supreme Court as may be permitted under controlling law" and that the judgment constituted "a final appealable order resolving claims that were or could have been brought in the above captioned adversary proceeding."

The Raynors appeal from the March 9, 2009 stipulated order. The sole issue on appeal is whether the complaint was time-barred.

Standard of Review

"The issue of whether a suit is time-barred is a question of law. . . ." *McCord v. Minn. Mut. Life Ins. Co. (In re Minn. Mut. Life Ins. Co. Sales Practices Litig.)*, 346 F.3d 830, 835 (8th Cir. 2003). We review questions of law de novo. *DeBold v. Case*, 452 F.3d 756, 761 (8th Cir. 2006); *Green Tree Servicing, LLC v. Coleman (In re Coleman)*, 392 B.R. 767, 769 (B.A.P. 8th Cir. 2008).

DISCUSSION

The order for relief in the Raynor case was entered on September 13, 2004. The trustee initiated the adversary proceeding against Maureen by filing a complaint on September 13, 2006. The Raynors argue that the trustee's suit against Maureen is time-barred by section 546 of the Bankruptcy Code, which provides:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of –
>
> (1) the later of –
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before

> the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a). The Raynors maintain that September 12, 2004 was the last day the trustee could have timely filed his complaint. The trustee argues that the statute of limitations had not run until after September 13, 2004, so that a complaint filed on the anniversary date of the entry of the order for relief is timely.

Under the Doctrine of Law of the Case, We Defer to the District Court's Determination that the Trustee's Suit was Timely.

The sole issue appealed by the Raynors is whether the trustee's suit against Maureen is time-barred by 11 U.S.C. § 546(a). That precise issue was addressed by the bankruptcy court and the district court, and both courts concluded that the suit was not time-barred. The Raynors now hope for a different outcome on the same issue, and the trustee argues that the law of the case doctrine should operate to prevent the bankruptcy appellate panel from revisiting the issue previously decided by the district court.

The Raynors misunderstand the doctrine of law of the case, and argue that because a decision of a single district court in the Eighth Circuit is not binding precedent as to the bankruptcy appellate panel, this panel should not defer to the district

court's earlier decisions. The issue of whether decisions of the district court are binding on the bankruptcy appellate panel is a separate and unrelated question from the one presented in the Raynors' appeal.

"Law of the case" is a policy of deference under which "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); *see also Little Earth of the United Tribes, Inc. v. United States Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1438 (8th Cir. 1986) ("The law of the case doctrine applies to issues implicitly decided in earlier stages of the same case."). Although reviewing courts are not required to refrain from revisiting their own decisions "if substantially different evidence is subsequently introduced or the decision is clearly erroneous and works manifest injustice," the doctrine of law of the case "prevents the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Little Earth*, 807 F.2d at 1441; *see also Woods v. Kenan (In re Woods)*, 215 B.R. 623, 625 (B.A.P. 10th Cir. 1998) (where appellants in a bankruptcy case, who had previously appealed to the United States District Court, sought further review from a different order of the same issues, the bankruptcy appellate panel found "that the law of the case doctrine should be applied to limit our review to issues not previously decided by the District Court");

5 Am. Jur. 2d, Appellate Review § 566 (2008) ("issues decided in earlier appellate stages of the same litigation should not be reopened, except by a higher court, absent some significant change in circumstances," so long as "there was a hearing on the merits and that there have been no material changes in the facts since the prior appeal").

The procedural history of the Raynors' appeal highlights the appellate choices afforded in bankruptcy cases in the Eighth Circuit. Aggrieved parties may appeal to either the district court or the bankruptcy appellate panel. 28 U.S.C. § 158(a). A party may not appeal a decision of the district court to the bankruptcy appellate panel or vice versa. Rather, after taking the intermediary appeal, the next court of review is the court of appeals. While a party electing to appeal to the district court may appeal a later bankruptcy court judgment to the bankruptcy appellate panel, we are not empowered to review decisions of the district court. The statute of limitations issue was fully examined by the district court, which ruled that the trustee initiated his adversary proceeding within the limitation period. We defer to the earlier decision of the district court and decline to revisit the issue of whether the trustee's suit was time-barred.

The policy considerations raised by a bankruptcy appellate panel's review of an issue previously decided in the same litigation by a district court are comparable to the policy considerations that the Supreme Court addressed in dictum in its *Christianson* decision. *Christianson v. Colt Indus. Operating Corp.*,

486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). In *Christianson*, the Court of Appeals for the Federal Circuit and the Court of Appeals for the Seventh Circuit had each disavowed jurisdiction over a particular case and transferred the case to the other. The Court reasoned that the law of the case doctrine "applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Id.* at 816. The Court observed that although a "court has the power to revisit prior decisions of its own or of a coordinate court," "as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)). Not only would our review of an issue decided by the district court upset the settled expectations of parties and uniformity of decisions, but it would hamper the judicial efficiency of the bankruptcy appeals process.

The District Court's Decision Is Not Clearly Erroneous and Does Not Result in Manifest Injustice.

The Raynors invoke the clearly erroneous and manifest injustice exceptions to the law of the case doctrine. Not only do we think the district court's decision is not clearly erroneous, we agree with the result reached by the district court.

There is really no need to resort to Rule 9006(a) or to consider whether § 546(a) is jurisdictional. Courts only look beyond the statute itself where the terms of the statute are ambiguous. "When we find the terms of a statute unambiguous, judicial inquiry is complete. . . ." *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981). Under 11 U.S.C. § 546(a), the specified avoidance actions "may not be commenced *after* the earlier of the later of 2 years *after* the entry of the order for relief. . . ." 11 U.S.C. § 546(a) (emphasis added). The language is inelegant, but it is unambiguously inclusive of the two-year anniversary of the entry of the order for relief. The trustee's complaint was timely so long as it was filed before midnight on the anniversary date of the entry of the order for relief. *See Callahan v. Moore (In re Gen. Creations, Inc.)*, 343 B.R. 548, 552 (Bankr. W.D. Va. 2006) (where order for relief was entered on July 22, 2003, "the statute of limitations set forth in 11 U.S.C. § 546(a)(1)(A) ended at midnight on July 22, 2005."); *In re Steck*, 298 B.R. 244, 249 (Bankr. D. N.J. 2003) (where the order for relief was entered on October 10, 2000, "the trustee had to commence an avoidance action *no later than* October 10, 2002") (emphasis added).

The statute clearly says that the last day to commence this proceeding was "2 years *after* the entry of the order for relief. . . ." 11 U.S.C. 546(a) (emphasis added). It seems clear to us that two years after September 13, 2004 is September 13, 2006, not September 12, 2006. If the Raynors' interpretation

were correct, one day after a day would be the same day. Clearly this is both legally and grammatically nonsensical.

Case Law Does Not Require a Different Result.

Finally, the Raynors argue that the district court's determinations must be reconsidered in light of 1) "New law stemming from the passage of the BAPCPA, the Bright Line Rule, which is determinative of this matter"; and 2) "Authority of the Eighth Circuit Bankruptcy Appellant Panel, not previously considered by this Court which is determinative of this matter." As to the first argument, this case was filed before BAPCPA's effective date, so any changes made by that statute do not apply. Besides, BAPCPA made no changes to the portion of § 546 at issue here. Although "the law of the case does not apply when an intervening decision from a superior tribunal clearly demonstrates the law of the case is wrong," the Raynors cannot avail themselves of that exception. *Morris v. Am. Nat'l Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993). First, none of the cases cited by the Raynors were intervening. The decisions were all issued prior to the district court order. Second, the bankruptcy appellate panel is not superior to the district court. Third, the cases cited by the Raynors do not demonstrate that the district court's conclusions were wrong.

The *Graham County* case required the Supreme Court to reconcile two plausible constructions of a statute of limitations, but there is only one plausible construction of 11 U.S.C. § 546(a). *Graham County Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 419, 125 S. Ct. 2444, 162 L. Ed. 2d 390 (2005) ("where, as the case is here, there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action . . . accrues."). The district court's conclusions are consistent with *Graham County*. Even if the *Graham County* rule of construction were applied to the time limitation in § 546(a), under the Raynors' theory, it would not change the outcome. Avoidance actions accrue when a debtor commences a case by filing a bankruptcy petition, which "constitutes an order for relief. . . ." 11 U.S.C. § 301(b). The avoidance actions therefore accrue on the same day as the order for relief is issued.

The Raynors also misread the *Bay Area Laundry* case, and have extrapolated a universal rule and urged its application in a manner that would be inconsistent with the plain meaning of § 546(a). *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997). In *Bay Area Laundry*, the Court construed a statute of limitations to avoid the absurd result that the limitations period might begin to run before a cause of action had ever accrued. The Court later wrote, "The question presented in *Bay Area*

Laundry was whether a statute of limitations could commence to run on one day while the right to sue ripened on a *later* day. We answered that question, *and only that question*, 'no,' unless the statute indicates otherwise." *TRW Inc. v. Andrews*, 534 U.S. 19, 34 n. 6, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (emphasis added). The Bay Area Laundry holding is consistent with the district court's conclusions.

The Raynors' reliance on the Eighth Circuit's *McCuskey* decision is similarly misplaced. *McCuskey v. Cent. Trailer Servs., Ltd.*, 37 F.3d 1329 (8th Cir. 1994). Because the sole issue considered by the *McCuskey* court was "whether the district court erred in concluding that the two-year statute of limitations started to run anew when [the chapter 7 trustee] was appointed" following the conversion of the case from chapter 11, the court's holding is not instructive on the issue raised in the Raynors' appeal. *Id.* at 1330-31.

The Raynors rely heavily on our opinion in *Lee v. Nat'l Home Centrs., Inc. (In re Bodenstein)*, 253 B.R. 46 (B.A.P. 8th Cir. 2000). In *Bodenstein*, the issue was whether the statute of limitations under 11 U.S.C. § 546(a) was equitably tolled during the pendency of the debtors' chapter 13 case. Although the precise expiration of the limitation period was not related to the holding of that case, we stated, "The Debtors filed their petition on November 21, 1996 and the order for relief was entered that same day. In accordance with Section 547(a)(1)(A), the period of two years after the entry of the order for relief expired on November 21,

1998." *Id.* at 50. In that context, we understand the term "expire" to mean that the avoidance action could not have been brought later than November 21, 1998.

CONCLUSION

We decline to revisit the issue of the timeliness of the trustee's complaint because that issue has already been decided by the district court. The bankruptcy court's March 9, 2009 order and judgment are affirmed.

APPENDIX C

2007 WL 4180713

United States District Court, D. Nebraska.
In re John P. RAYNOR, Debtor.
Richard D. Myers, Trustee of the John P. Raynor Chapter 7 Bankruptcy Estate, Appellee/Plaintiff,
v.
Maureen Raynor, Appellant/Defendant.
No. 8:07CV151.
No. BK04-83112.
Adv. No. A06-8105.

Nov. 21, 2007.

Alan E. Pedersen, McGill, Gotsdiner Law Firm, Omaha, NE, for Appellee/Plaintiff.

Elizabeth M. Callaghan, William L. Biggs, Jr., Gross, Welch Law Firm, Omaha, NE, for Appellant/Defendant.

MEMORANDUM AND ORDER

RICHARD G. KOPF, District Judge.

This is an interlocutory appeal filed by the appellant/defendant, Maureen Raynor, from orders that were entered by the bankruptcy court denying her motion to dismiss the Trustee's adversary complaint and her motion for rehearing. Ms. Raynor has elected to have this appeal heard by the district court (filing 4). After briefing on the issue of whether this court has jurisdiction to entertain the appeal, and subsequent briefing on the merits of this appeal, this matter is now ripe for

disposition. (Filing 13, Order Granting Leave to Appeal & Setting Briefing Schedule.)

BACKGROUND

On September 13, 2004, John P. Raynor ("Debtor") filed a voluntary petition in the United States Bankruptcy Court for the District of Nebraska, seeking the entry of an order for relief under Chapter 11 of the United States Bankruptcy Code. (Filing 3-2, Docket Sheet from U.S. Bankruptcy Court, District of Nebraska, Case No. BK04-83112.)An order of relief was entered on September 13, 2004.[1] On June 2, 2005, the bankruptcy court issued an order converting the case to a Chapter 7 proceeding, and the Trustee was appointed a day later. (*Id.*) On September 13, 2006 – the second anniversary of the Debtor's voluntary petition filed in bankruptcy court – the Trustee filed an adversary proceeding against Maureen Raynor, the wife of the Debtor, the purpose of which was to avoid alleged preferential transfers in violation of § 547 of the Bankruptcy Code, other transfers pursuant to § 544 of the Code and the Nebraska Uniform Fraudulent Transfer Act, and unauthorized post-petition transfers. The Trustee's adversary complaint consisted of five causes of action – four involving alleged pre-petition transfers, and one involving

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[1] "In a voluntary bankruptcy case, the date that the petition is filed is the date of the entry of an order for relief." 3 *Bankruptcy Litigation* § 16:49 (July 2007)

alleged post-petition transfers. (Filing 155, U.S. Bankruptcy Court, District of Nebraska, Case No. BK04-83112; Filing 1, U.S. Bankruptcy Court, District of Nebraska, Case No. A06-8105.)

Maureen Raynor filed a motion to dismiss the adversary proceeding as untimely pursuant to the two-year statute of limitations, 11 U.S.C. § 546(a), which provides in relevant part:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of –
>
> (1) the later of –
>
> (A) 2 years after the entry of the order for relief;

Ms. Raynor argued that the limitations period ran on September 12, 2006, and the adversary complaint was filed one day later, September 13, 2006, which was the second anniversary of the filing of Debtor's voluntary petition in bankruptcy court.

The bankruptcy court denied the motion to dismiss, finding:

> Based upon the statutory interpretation procedure identified as appropriate by the Eighth Circuit Court of Appeals, and based upon the expressed Congressional intent that 11 U.S.C.

> § 546(a)(1) is not jurisdictional, Rule 9006(a)[2] is properly applied in the computation of time that the Trustee must abide by when bringing an avoidance action. In this case, Rule 9006(a) would permit the Trustee to begin the count on the day following the petition date and end the count on the anniversary date of the petition filing. Following that counting procedure, the Trustee's filing of the complaint on September 13, 2006, is timely.

(Filing 15, U.S. Bankruptcy Court, District of Nebraska, Case No. A06-8105, Memorandum on Motion to Dismiss Adversary Proceeding at 4.) The bankruptcy court denied Ms. Raynor's motion to reconsider this ruling in a "text-only order." (*Id.*, Docket Sheet, Filing 20.) This appeal followed.

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[2] Rule 9006, in relevant part, provides:

> In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or *by any applicable statute*, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Id. (italics added).

The parties agree that the question in this appeal is "whether the 'triggering event' commences the running of the two-year statute of limitations, or whether the statute of limitations commences the day after the day of the 'triggering event'". (Filing 13, at 2.)

DISCUSSION

"'When a bankruptcy court's judgment is appealed to the district court, the district court acts as an appellate court and reviews the bankruptcy court's legal determinations de novo and findings of fact for clear error.'" *In re Falcon Products, Inc.*, 497 F.3d 838, 840-41 (quoting *In re Fairfield Pagosa, Inc.*, 97 F.3d 247, 252 (8th Cir.1996)). After a de novo review of the bankruptcy court's legal findings, I shall deny Maureen Raynor's appeal from the bankruptcy court's orders denying her motion to dismiss the Trustee's adversary complaint and her motion for rehearing.

For the reasons thoroughly and clearly stated in Judge Mahoney's order denying Maureen Raynor's motion to dismiss, I agree that "if the Eighth Circuit Court of Appeals had before it the question of whether Rule 9006(a) should be applied to 11 U.S.C. § 546(a), it would first determine whether § 546(a) was jurisdictional or, alternatively, simply a statute of limitations.[3] If it determined the statute was not

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[3] As explained in Judge Mahoney's order, the Eighth Circuit Court of Appeals has applied Fed.R.Civ.P. 6(a), a time-computation

(Continued on following page)

jurisdictional, the counting would start per Rule 9006(a) on the day following the date the petition was filed, and end on the anniversary date of the petition filing," thus making the Trustee's adversary complaint timely.

I find that, if confronted with the issue in this appeal, the Eighth Circuit Court of Appeals would align itself with the majority of courts that have addressed the applicability of Rule 9006(a) to 11 U.S.C. § 546(a) and the legislative history behind the 1994 amendments to § 546(a) to conclude that § 546(a) is not jurisdictional. *See In re Pugh*, 158 F.3d 530 (11th Cir.1998) (limitations period in 11 U.S.C. § 546(a) is waivable statute of limitations subject to estoppel and equitable tolling, not jurisdictional bar); *In re General Creations, Inc.*, 343 B.R. 548 (Bankr.W.D.Va.2006) (Bankruptcy Rule 9006(a) governs computation of time to take action prescribed by 11 U.S.C. § 546); *In re Art & Co., Inc.*, 179 B.R. 757 (Bankr.D.Mass.1995) (Rule 9006 applies to computation of time in 11 U.S.C. § 546(a)); *In re Southern Technical College, Inc.*, 172 B.R. 253 (Bankr.E.D.Ark.1994) (applying Rule 9006(a) to two-year limitations period in 11 U.S.C. § 546; finding that date on which bankruptcy

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statute similar to Bankruptcy Rule 9006(a), when a statute of limitations was not jurisdictional because Fed.R.Civ.P. 82 prevents the use of the Rules of Civil Procedure to extend the jurisdiction of United States district courts. *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir.1999) ("before determining whether we should apply Rule 6(a) to the one-year time limit in § 2255, we must first determine whether that time limit is jurisdictional").

petition was filed was excluded from two-year period in deciding whether avoidance proceeding was timely); *In re Sutera,* 157 B.R. 519, 523 (Bankr.D.Conn.1993) (Rule 9006(a) is "applicable in full, and without exception, to all provisions of the Bankruptcy Code, and . . . Rule 9006(a) shall apply to Code § 546(a)"); *In re Amdura Corp.,* 142 B.R. 433, 435 (Bankr.D.Colo.1992) ("an abundance of case law in other circuits" supports idea that Rule 9006(a) applies to calculation of two-year statute of limitations in 11 U.S.C. § 546(a); "Congress did not say that [Bankruptcy Rule 9006(a)] was to apply to statutes only if they were procedural or only if they did not confer jurisdiction. The rule is not so limited. The intent was that the rule apply to all applicable statutes. To find otherwise would require a determination that Congress did not mean what it said."). *See also* H.R. Rep. 103-835, P.L. 103-394, Bankruptcy Reform Act of 1994, *available at* 1994 WL 562232, at *50-51, or 1994 U.S.C.C.A.N. 3340, at 3358 (Oct. 4, 1994) ("Section-by-Section Analysis"; Discussion of Section 217, "Limitation of Avoiding Powers") ("This section clarifies section 546(a)(1) of the Bankruptcy Code. . . . The time limits are not intended to be jurisdictional and can be extended by stipulation between the necessary parties to the action or proceeding."); 2 Bankruptcy Desk Guide § 17:55 (Aug.2007), *available at* Westlaw Database BDR-BDG § 17:55 (time limits in 11 U.S.C. § 546(a) were not intended to be jurisdictional, but a true statute of limitations; "The Bankruptcy Rules provide that in computing any period of time prescribed or allowed by any applicable statute, the day of the act,

event, or default from which the designated period of time begins to run is not included. . . . This Rule has been applied to the computation of the limitations period in 11 U.S.C.A. § 546(a).").

Because 11 U.S.C. § 546(a) is not jurisdictional, the time-computation rules of Bankruptcy Rule 9006(a) apply,[4] and calculation of the limitations period in 11 U.S.C. § 546(a) would begin on the day following the date the petition was filed – September 14, 2004 – and end on the anniversary date of the petition filing – September 13, 2006 – making the Trustee's September 13, 2006, filing of the adversary proceeding against Maureen Raynor timely. Accordingly, I shall deny Maureen Raynor's appeal from the bankruptcy court's orders denying her motion to dismiss the Trustee's adversary complaint and her motion for rehearing.

IT IS ORDERED:

1. The appeal filed by defendant/appellant Maureen Raynor is denied;

2. The bankruptcy court's orders denying Maureen Raynor's motion to dismiss (Filing 15, U.S. Bankruptcy Court, District of Nebraska, Case No.

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[4] One could convincingly argue that Rule 9006 applies – regardless of how 11 U.S.C. § 546(a) is characterized – because by its own terms, Rule 9006 applies to "any applicable statute."

A06-8105, Memorandum on Motion to Dismiss Adversary Proceeding) and motion to reconsider (*Id.*, Docket Sheet, Filing 20) are affirmed;

3. Judgment shall be entered by separate document.

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: JOHN PATRICK RAYNOR, Debtor(s).	CASE NO. BK04-83112 A06-8105 CH. 7
RICHARD D. MYERS, Trustee of the John P. Raynor Chapter 7 Bankruptcy, Plaintiff, v. MAUREEN RAYNOR, Defendant.	

MEMORANDUM

Hearing was held in Omaha, Nebraska, on December 21, 2006, regarding Filing No. 8, Motion to Dismiss Adversary Proceeding, filed by Maureen Raynor, and Filing No. 11, Resistance, filed by Richard D. Myers. Alan Pedersen appeared for Richard D. Myers and Elizabeth Callaghan appeared for Maureen Raynor. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(F), (H) and (O).

On September 13, 2004, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy

Code. An order for relief was entered September 13, 2004. The Trustee was appointed on June 3, 2005, on the date the case was converted to Chapter 7. The Trustee filed this adversary proceeding against the defendant, the purpose of which was to avoid alleged preferential transfers in violation of § 547 of the Bankruptcy Code, to avoid certain other transfers pursuant to § 544 of the Code and the Nebraska Uniform Fraudulent Transfer Act, and to avoid unauthorized post-petition transfers. The complaint was filed on September 13, 2006.

The defendant has filed a motion to dismiss the adversary proceeding as untimely, on the theory that the applicable two-year statute of limitation accrued on September 13, 2004, the day the alleged causes of action accrued, that is, the petition date. The defendant asserts that the statute of limitation, 11 U.S.C. § 546(a) ran on September 12, 2006. Since the adversary complaint was filed one day after that date, on September 13, 2006, the defendant suggests that this court lacks jurisdiction and a dismissal with prejudice is warranted.

The statutory provision relied upon by the defendant is 11 U.S.C. § 546(a). It states:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of –
>
> (1) the later of –
>
> (A) 2 years after the entry of the order for relief; or

> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

The Trustee resists the motion to dismiss because it is his position that Federal Rule of Bankruptcy Procedure 9006(a) makes the complaint timely. Rule 9006(a), in relevant part, states:

> In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Rule 9006(a) is basically the same as Federal Rule of Civil Procedure 6(a). If Rule 9006(a) is applicable to 11 U.S.C. § 546(a), the first date used for

calculating the statutory time limit would be September 14, 2004, the day following the petition date. The last date included in the two year limitations period would be September 13, 2006, the anniversary date of the petition filing. Bankruptcy courts, generally, have determined that Rule 9006(a) governs the computation of time on a period of time to take action as prescribed by an applicable statute, such as 11 U.S.C. § 546. *See Grella v. Zimmerman (in re Art & Co.)*, 179 B.R. 757, 762 (Bankr. D. Mass. 1995) (stating "the vast majority of courts has [sic] ruled that, in light of the language of Fed. R. Bankr. P. 9006(a), the date of the trustee's appointment should not be counted in computing the statute of limitations under section 546(a)"); *Callahan v. Moore (In re Gen. Creations, Inc.)*, 343 B.R. 548 (Bankr. W.D. Va. 2006); *S. Tech. Coll. v. Ark. Television Co. (In re S. Tech. Coll., Inc.)*, 172 B.R. 253 (Bankr. E.D. Ark. 1994); *Boatman v. Furnia (In re Sutera)*, 157 B.R. 519 (Bankr. D. Conn. 1993); *Amdura Corp. v. Faegre & Benson (In re Amdura Corp.)*, 142 B.R. 433 (Bankr. D. Col. 1992); *Zimmerman v. Nat'l Elec. Benefit Fund (In re Kaelin Assoc. Elec. Constr., Inc.)*, 70 B.R. 412 (Bankr. E.D. Pa. 1987); *Judson v. Int'l Terminal Operating Co. (In re Oro Import Co.)*, 69 B.R. 6 (S.D. Fla. 1986); *Salomon v. Pan Am. World Airways, Inc. (In re Black & Geddes, Inc.)*, 35 B.R. 827 (Bankr. S.D.N.Y. 1983).

However, the Court of Appeals for the Sixth Circuit, when faced with the specific question presented in this case, held that the two year time period

begins to run as of the date of the Trustee's appointment. It found that § 546(a) was "jurisdictional" and that Rule 9006(a) could not be used to extend the jurisdictional grant provided by the statute. The Circuit Court in *Martin v. First Nat'l Bank of Louisville (In re Butcher),* 829 F.2d 596 (6th Cir. 1987), followed its own earlier decision in *Rust v. Quality Car Corral, Inc.,* 614 F.2d 1118 (6th Cir. 1980), which dealt with the application of Civil Rule 6(a). However, the refusal of the Court to apply Rule 9006(a) and Civil Rule 6(a) in *Butcher* and *Rust* was specifically overruled by the Sixth Circuit sitting *en banc* in *Bartlik v. U.S. Department of Labor,* 62 F.3d 163, 166 (6th Cir. 1995). In *Bartlik,* the Sixth Circuit determined that, contrary to its prior decisions, it now conceptualizes Civil Rule 6(a) as merely providing a method of computing time, and not as expanding or extending a statute of limitations.

The Sixth Circuit's reexamination of the applicability of Civil Rule 6(a) is significant because the Eighth Circuit Court of Appeals relied upon *Rust v. Quality Car Corral, Inc.,* when it determined in *Mattson v. U.S. West Communications, Inc.,* 967 F.2d 259 (8th Cir. 1992), that under the Fair Debt Collection Practices Act, for a court to have jurisdiction, the complaint must be filed on the day prior to the anniversary of the date of mailing, which, by analogy to this adversary proceeding, would be the day before the anniversary of the bankruptcy petition filing date. *Mattson,* itself, was somewhat inconsistent with a prior Eighth Circuit decision, *McDuffee v. United*

States, 769 F.2d 492, 494 (8th Cir. 1985), which cited with approval other courts that had applied Civil Rule 6(a) to federal statutes of limitations. More recently, in *Moore v. United States,* 173 F.3d 1131 (8th Cir. 1999), the Eighth Circuit Court of Appeals, when interpreting the Anti-terrorism and Effective Death Penalty Act's (AEDP) one year time limit for filing motions to set aside or vacate sentences, determined that the AEDP is a statute of limitations, not a jurisdictional bar, and therefore a motion for post-conviction relief had to be filed no later than the anniversary date of the effective date of the statute, not one day prior to the anniversary date. The court stated:

> We declined to apply Rule 6(a) in *Mattson* because the statute of limitations in the FDCPA was jurisdictional, and Fed. R. Civ. P. 82 prevents the use of the Rules of Civil Procedure to extend the jurisdiction of district courts. Thus, before determining whether we should apply Rule 6(a) to the one-year time limit in § 2255, we must first determine whether that time limit is jurisdictional.

173 F.3d at 1134. The court determined that the time limit under that statute was not jurisdictional and did apply Rule 6(a) to begin the computation of time one day after the effective date of the enactment of the statute.

Analogously, it would appear that if the Eighth Circuit Court of Appeals had before it the question of whether Rule 9006(a) should be applied to 11 U.S.C.

§ 546(a), it would first determine whether § 546(a) was jurisdictional or, alternatively, simply a statute of limitations. If it determined the statute was not jurisdictional, the counting would start per Rule 9006(a) on the day following the date the petition was filed, and end on the anniversary date of the petition filing.

Congress seems to have been more helpful with regard to whether § 546(a) is jurisdictional than it was with regard to other statutory provisions which have been interpreted by the courts. Section 546(a) was amended in 1994 by Public Law 103-394, the Bankruptcy Reform Act of 1994. In the section-by-section analysis in the legislative history, Section 216, the applicable amendment to the limitation of avoiding powers, the House Report discussing the amendment states:

> This section clarifies section 546(a)(1) of the Bankruptcy Code which imposes a 2-year statute of limitations within which an appointed trustee must bring an avoidance action. The purpose of a statute of limitations is to define the period of time that a party is at risk of suit. This section defines the applicable statute of limitations as 2 years from the entry of an order of relief or 1 year after the appointment of the first trustee if such appointment occurs before the expiration of the original 2-year period. **The section is not intended to affect the validity of any tolling agreement or to have any bearing on the equitable tolling doctrine where there has been fraud determined**

> **to have occurred. The time limits are not intended to be jurisdictional and can be extended by stipulation between the necessary parties to the action or proceeding**. (Emphasis added.)

Based upon the statutory interpretation procedure identified as appropriate by the Eighth Circuit Court of Appeals, and based upon the expressed Congressional intent that 11 U.S.C. § 546(a)(1) is not jurisdictional, Rule 9006(a) is properly applied in the computation of time that the Trustee must abide by when bringing an avoidance action. In this case, Rule 9006(a) would permit the Trustee to begin the count on the day following the petition date and end the count on the anniversary date of the petition filing. Following that counting procedure, the Trustee's filing of the complaint on September 13, 2006, is timely. Therefore, the motion to disdismiss is denied. A separate order will be entered.

DATED: January 26, 2007 BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
Alan Pedersen
*Elizabeth Callaghan
U.S. Trustee

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* Movant (*) is responsible for giving notice to other parties if required by rule or statute.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 07-3919

In re: Maureen Raynor,

Petitioner

Appeal from the District of Nebraska – Omaha
(8:07-cv-00151-RGK)

JUDGMENT

Petition for writ of mandamus has been considered by the court and is denied.

January 04, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

Maureen Raynor, Petitioner
v.
United States District Court
for the District of Nebraska.

No. 07-1197.

SUPREME COURT OF THE UNITED STATES

553 U.S. 1065; 128 S. Ct. 2528; 171 L. Ed. 2d 787; 2008 U.S. LEXIS 4441; 76 U.S.L.W. 3628

May 27, 2008, Decided

JUDGES: Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito.

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 09-2464

In re: John Patrick Raynor

Debtor

Richard D. Myers, Trustee of the
John P. Raynor Chapter 7 Bankruptcy

Appellee

v.

Maureen Raynor and John Patrick Raynor

Appellants

Appeal from the Bankruptcy Appellate Panel
for the Eight Circuit
(09-6012)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans